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I. INTRODUCTION

Federal Rule of Evidence 804(b)(6)[1] is a rule with a laudable purpose but a misperceived pedigree and a dangerous effect. Entitled "Forfeiture by Wrongdoing," the Rule purports to be the latest exception to the rule precluding hearsay. Unlike the other thirty hearsay exceptions, however, it admits out-of-court statements bearing no indicia of trustworthiness.[2] In fact, this hearsay exception is an unfocused sanction imposed on a party who intentionally makes a hearsay declarant unavailable. This sanction allows for the admission of any relevant statement made by the absent hearsay declarant irrespective of the trustworthiness of that statement. Moreover, the admission of such unreliable hearsay can provide the basis for a verdict and the imposition of the harshest criminal penalties or civil damages.

The adverse effect of having cases decided on untrustworthy hearsay is facilitated by the operation of Rule 104, which permits the admission of such evidence on a minimal predicate showing that a party has procured the hearsay declarant's unavailability. When making the determination as to whether a party has procured a hearsay declarant's unavailability by wrongdoing, the trial judge need only find that a reasonable juror could find the wrongdoing

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1. Codified in 1997, the rule is an exception to the general rule against hearsay. It is a subpart of Rule 804 which provides exceptions where the declarant, i.e., the person making the out-of-court statement, is unavailable to testify to her statements in court. Rule 804(b)(6) provides that a hearsay statement is admissible where it is "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." FED. R. EVID. 804(b)(6). Note that pursuant to Rule 804(a), an "unavailable" witness includes, inter alia, a declarant who is in fact present in court but persists in refusing to testify. FED. R. EVID. 804(a)(2). Twenty-four states have forfeiture by wrongdoing hearsay exceptions with varying requirements. They are outlined in a chart contained in Appendix A to this article.

2. *See* FED. R. EVID. 803-04.

by a preponderance of the evidence.[3] Such finding may be based on entirely inadmissible evidence.[4]

The combination of the unreliability of FRE 804(b)(6) evidence, the fact that FRE 804 does not require any indicia of the reliability, combined with the low quantum of proof required by FRE 104 allows the liberty and property interests of parties to be decided by evidence that may very well be untrustworthy. As a result we will argue that the policy of FRE 804(b)(6) is unwise and contrary to the truth-seeking function of the criminal and civil trial because it allows the introduction of evidence which hundreds of years of Anglo-American legal experience have shown to be unreliable. Indeed, though not reaching the constitutional Due Process question, the Supreme Court noted in *Bridges v. Wixon* that "allow[ing] men to be convicted on unsworn testimony of witnesses...[is] a practice which runs counter to the notions of fairness on which our legal system is founded."[5]

This article argues that the "Forfeiture by Wrongdoing" exception to the hearsay rule is utterly lacking in any of the traditional indicia of trustworthiness, which are the universal hallmark of all admissible hearsay evidence pursuant to the Federal Rules of Evidence.[6] Further, we take the position that

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3. FED. R. EVID. 104(b) (stating "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition").

4. *See* FED. R. EVID. 104(a); Bourjaily v. United States, 483 U.S. 171, 172 (1987) (reaffirming that the Rules of Evidence (except privilege) do not apply to evidentiary foundations); Davis v. Washington, 126 S. Ct. 2266, 2281 (2006) (Thomas, J., concurring in part and dissenting in part) (applying these standards to FED R. EVID. 803(6)).

5. 326 U.S. 135, 153-54 (1945). *Cf.* Kelley Rutan, Comment, *Procuring the Right to an Unfair Trial: Federal Rule of Evidence 804(b)(6) and the Due Process Implications of the Rule's Failure to Require Standards of Reliability for Admissible Evidence*, 56 AM. U. L. REV. 177 (2006) (arguing that the operation of Rule 804(b)(6) violates the Due Process Clause of the Fifth Amendment by denying a criminal defendant a fair trial). Though we do not go so far as to claim that Rule 804(b)(6) is, in fact, unconstitutional, the line between Constitutional "unfairness" of convicting a citizen on untrustworthy evidence and its lack of wisdom is a thin one.

6. The Federal Rules of Evidence sets out a scheme for determining the admissibility of hearsay that has as its unifying principle that for evidence to be admissibly for must be tested against two validating notions: reliability and necessity. *See, e.g.*, FED. R. EVID. 105 (ensuring that evidence which is reliable against one party can be unreliable against another, or that evidence reliable for one purpose can be unreliable for another); FED. R. EVID. 106 (guaranteeing reliability by ensuring that all of a writing that ought to be considered in fairness is considered); FED. R. EVID. 201 (providing for judicial notice of facts that are so reliable because of their certainty or general agreement that the judge can bypass the need for proof through witnesses and other evidence); FED R. EVID. 301-02 (relying on the common law of presumptions, based on reliability, for jury instruction); FED R. EVID. 401-15 (chronicling relevance and all of its permutations, allowing for a wide definition of relevant evidence, tempered by

this rule is an unnecessary systemic check against civil and criminal litigants who intentionally subvert the justice system by procuring the unavailability of witnesses by wrongdoing. Other sanctioning mechanisms which do not allow criminal and civil justice decisions be influenced or determined by untrustworthy evidence exist and are better tailored to the deterrence and punishment functions purportedly performed by Rule 804(b)(6).

Part II of this article will examine the historical underpinnings of the law of hearsay and its exceptions, and the sometimes overlapping, but different, right to confront one's accusers in a criminal case as governed by the Sixth Amendment to the United States Constitution.[7] Although the forfeiture doctrine made its way into hearsay law by an imperfect and uncritical, though superficially appealing, analogy to the Confrontation Clause forfeiture doctrine, the Supreme Court's recent decoupling of any relationship between the Confrontation Clause and the hearsay rule[8] makes clear that the analogy was inappropriate. We will conclude, based in part on this Supreme Court analysis, that the determination of whether a criminal defendant can cross-examine a hearsay declarant or forfeits that right by misconduct in no way insures the reliability of hearsay evidence so as to make it admissible in criminal cases. Of course, the Confrontation Clause is inoperative in civil cases and provides no hearsay referent in civil cases. We will take the position that once Con-

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the limited use of character evidence in Rule 404 because of the unreliability of past act evidence in deciding the existence of later actions, and the exclusion of certain evidence in order to foster some necessary policies in Rules 407-15); FED. R. EVID. 501 (again relying on state law in the main for excluding otherwise relevant evidence in order to support some necessary relationships such as attorney-client and doctor-patient); FED. R. EVID. 601-02, 607-13 (providing for the reliability of evidence provided by first hand knowledge of witnesses in Rules 601 and 602, and providing for tests of reliability in impeachment as provided in Rules 607-13); FED. R. EVID. 701-06 (allowing some lay opinions in Rule 701 that are necessary for a fair determination of the case and have other indicia of reliability in that they are based on the senses, and establishing the entire scheme for determining the reliability and necessity for expert testimony in Rules 702-06); FED. R. EVID. 801-07 (premised on the unreliability of out of court statements in Rules 801 and 802, modified by the admissibility of reliable and necessary hearsay enumerated in the exceptions to the hearsay rule); FED. R. EVID. 901-03 (requiring that admissible evidence be authentic, a reliability notion); FED. R. EVID. 1001-08 (providing, in part, that the most reliable evidence of a document, an original, be produced in appropriate cases, which can be excused by the production of either reliable evidence (duplicates) or necessary secondary evidence after a valid explanation for the missing original).

7. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.")

8. *See* Crawford v. Washington, 541 U.S. 36 (2004); *Davis*, 126 S. Ct. at 2273.

frontation Clause rights, and the reliability of some hearsay, are recognized as separate concepts, Rule 804(b)(6) is an exception that fails to accomplish the indispensable function of the hearsay rule (and its exceptions) in keeping from the jury evidence which bears no imprint or even suggestion of reliability. As currently constructed, Rule 804(b)(6) should be eliminated.

Part III will illustrate the current operation of FRE 804(b)(6) by tracing two hypothetical situations, one civil and one criminal, which demonstrate the over-breadth of the exception as a means of punishing wrongdoers who intentionally procure the unavailability of witnesses. We will question whether the sanctioning effect of the rule makes sense in the federal rules scheme for admitting and excluding evidence by examining the effect of this unique "exception" on the reliability of verdicts.

Part IV will enumerate the alternatives for sanctioning these unavailability- inducing wrongdoers which currently exist in the criminal and civil justice system and argue that these sanctions are better tailored to remedy the wrong. We will conclude that Rule 804(b)(6) over-reaches in its zeal to punish these wrongdoers. The current construction of Rule 804 (b)(6), which allows the admissibility of potentially untrustworthy evidence takes the place of and supersedes other methods, better designed and more effectively focused, in which conduct that triggers the sanction of the rule can be more appropriately dealt with in both the civil and criminal justice systems. We will conclude that Federal Rule 804(b)(6) should be repealed.

II. HEARSAY RULE AND THE FORFEITURE EXCEPTION

A. Brief History of Hearsay, Its Exceptions and Cross-Examination

The Federal Rules of Evidence define hearsay as an out-of-court written or oral statement which is offered to prove the content of the statement at trial.[9] Generally, even the offer of hearsay by a witness who is reporting in court her own out-of-court statement is inadmissible.[10] Hearsay is inadmissi-

9. FED. R. EVID. 801 ("(a) Statement. A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. (b) Declarant. A 'declarant' is a person who makes a statement. (c) Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); *see also* FED. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

10. *See* FED. R. EVID. 801(d)(1) (setting out the limited circumstances where the fact the in court witness and the out of court declarant are one in the same is relevant to hearsay analysis). The rule provides:

> (d) Statements which are not hearsay. A statement is not hearsay if (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the

ble, in part, on the theory that it is not cross-examined at the time it is uttered.[11] Hearsay simply does not meet the testimonial ideal of American justice: in-court testimony by a witness of her first-hand, out-of-court observations followed immediately by at least the opportunity for a partisan cross-examination.

In the Anglo-American world, cross-examination is considered to be critical to the fact-finder's ability to accurately assess the credibility of the witness and the weight to be given to that witness's testimony.[12] A witness's ability to perceive, remember, and narrate events observed in the outside world,[13] and the witness's reasons or propensities to be either truthful or untruthful in giving testimony,[14] are considered indispensable aids to the fact-finder's performance of its function. Through cross-examination, counsel has the ability to both impeach the credibility of the witness's direct examination testimony as well as draw out qualifying circumstances which limit or contextualize the testimony. In addition, all of this examination is done in the presence of the fact-finder who can evaluate the demeanor and the manner in which testimony is provided in determining the weight, if any, to be given to the testimony of any witness.[15]

It is, of course, the weighing of the credibility of conflicting witnesses, taken together with a consideration of exhibits, which usually determines the outcome of cases litigated through trial. Because American justice, the most pristine remaining exemplar of the adversarial system, is committed to limit-

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> statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement.

Id. There are, however, four states where the out-of-court statements of a witness can be reported by that witness merely because the witness is available for cross-examination.

11. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1362, at 3 (5th ed. 1974). In addition, the repetition of out-of-court statements deprives the fact-finder of the ability to judge the credibility of the hearsay declarant based on his or her demeanor and attitude towards the providing of information available from in-court testimony. Of course, the out-of court statement can otherwise be excluded because it is violative of some other rule of evidence. *See, e.g.*, FED. R. EVID. 701 (opinion rule); FED. R. EVID. 602 (the requirement of first hand knowledge); FED. R. EVID. 407-12 (inadmissibility of the evidence for some policy reason).

12. 5 WIGMORE, *supra* note 11, § 1367, at 32.

13. *Id.* § 1362, at 4. (citing Judson F. Falknor, *Silence as Hearsay*, 89 U. PA. L. REV. 192, (1940)).

14. *See, e.g.*, FED. R. EVID. 608-09, 611.

15. *See* 5 WIGMORE, *supra* note 11, § 1368, at 37.

ing evidence to that information gathered by the parties and presented in a single trial through courtroom exhibits and witnesses, cross-examination and the concomitant exclusion of hearsay (i.e., un-cross-examined evidence) are critical to our system of criminal and civil justice, particularly when the case is presented to a jury.[16]

Prior to the Sixteenth Century, the above-described trial system did not exist in America. As in England at the time, American jurors obtained the facts of the case not from witnesses who testified at trial but rather through their own individual knowledge and investigations of the events and the parties in question.[17] Indeed, jurors drawn from the locale of the litigated events usually had pre-existing knowledge of the parties and incidents involved and were permitted to use such information in reaching their verdicts.[18] During this period, consideration of the hearsay nature of information was of little concern.[19] By the 1500's, however, jury trials began to resemble the trials of today[20] and juries began to acquire their information from courtroom witnesses rather than their own personal knowledge and independent research.[21] As jurors became obligated to rely on the testimony of witnesses at trial, courts became more fastidious concerning the reliability of the evidence jurors could consider;[22] and cross-examination became the means to provide jurors with the information necessary to evaluate witness credibility and the reliability of the evidence they offered.[23] The fact that hearsay – unlike in-court testimony – was not cross-examined when uttered raised doubts about its reliability and made its admission suspect.[24] By the 1600's hearsay was routinely the subject of objection at trial, and by the 1700's a general doctrine excluding the admission of hearsay from evidence at trial was firmly established.[25] This doctrine is codified in rules 801 and 802 of the Federal Rules of Evidence.[26]

As long as there has been a rule precluding hearsay from trial evidence, there have been exceptions to the rule.[27] Although the rule against hearsay places a premium on excluding from evidence statements that cannot be tested by cross-examination, there has always been the recognition that there

16. *See id.* § 1364, at 12-28; E.W. Hinton, *Changes in Exceptions to the Hearsay Rule*, 29 ILL. L. REV. 422, 424 (1934).

17. *See* 5 WIGMORE, *supra* note 11, § 1364, at 14-15.

18. *See* Hinton, *supra* note 16, at 422-23; 5 WIGMORE, *supra* note 11, § 1364, at 15.

19. *See* 5 WIGMORE, *supra* note 11, § 1364, at 15.

20. *Id.* at 17.

21. *Id.*

22. *Id.*

23. *Id.* § 1367, at 32-33.

24. *Id.* § 1364, at 20.

25. *Id.*

26. *See* FED. R. EVID. 801, 802.

27. *See* 5 WIGMORE, *supra* note 11, § 1425, at 256.

is a need to admit some hearsay, since much of it is relevant and the information it imparts may not be generally available otherwise.[28] For example, an exception to the hearsay rule allowing the admission of "dying declarations" has long been recognized. Originally limited to cases of homicide where the declarant had actually died from the claimed murder, the exception was premised on the necessity of receiving the information from the dead declarant because murders often occurred in relatively secluded settings outside the presence of other witnesses, and the victim arguably had the best information concerning the identification of his assailant. In addition, the statements of these declarants were thought to be reliable and trustworthy because of the religious assumption that a person, believing that death is imminent, is not likely to meet his maker with a lie on his lips.[29]

Other exceptions developed over time based on these dual notions of the necessity of the evidence and the reliability of the information contained within the hearsay statement. Common law courts balanced the need to obtain relevant and probative evidence with the need to avoid admission of generically untrustworthy evidence,. The common law and the later evidence code writers adopted hearsay exceptions for categories of statements which are usually relevant, often hard to reproduce and generally bear significant guarantees of trustworthiness in the circumstances of their making or adoption.[30] These exceptions have been codified in the Federal Rules of Evidence in FREs 803, 804 and 807.[31] Although necessity seems to be a factor in these hearsay exceptions,[32] necessity alone is not enough to justify the recognition of a hearsay exception; trustworthiness is the more important factor and must be present in the circumstances under which the statement is made in order to recognize an exception.[33] As we saw in the case of dying declarations, there was a coupling of necessity (the declarant is dead and has relevant information) with trustworthiness (the declarant's dying words will be truthful for religious reasons).

While necessity ordinarily means that either the evidence is generally unavailable, or other evidence on the same matter of similar value cannot be easily obtained, trustworthiness has proven more difficult to define.[34] While some scholars, and the cases they analyze, have defined the trustworthiness factor in the positive, i.e., that there is some incentive to be truthful, others have looked to the negative, that is, a lack of circumstances which would

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28. *Id.* § 1420, at 252.

29. *See* FED. R. EVID. 804(b)(2) (titled: "Statement Under Belief of Impending Death").

30. 5 WIGMORE, *supra* note 11, § 1420, at 251-52.

31. *See* FED. R. EVID. 803-04, 807.

32. 5 WIGMORE, *supra* note 11, § 1420, at 251-52.

33. *Id.* at 251.

34. *See id.*

engender lying or inaccuracy.[35] Wigmore has comprehensively identified three circumstances which create the basis for reliable statements: (1) those in which we would expect sincere and accurate statements to be uttered; (2) those where the danger of easy detection or the fear of punishment would encourage truthfulness; and relatedly (3), those statements made in public in a context which provides the obvious opportunity for detection and correction.[36] Although we can find evidence of some or all of the Wigmore factors in every pre-1997 hearsay exception, it is important to point out that the key and common factor in determining the trustworthiness or reliability of admissible, exceptional hearsay is not necessarily its actual objective accuracy, but its likely sincerity.[37]

The hearsay exceptions in Rules 803 and 804 of the Federal Rules of Evidence historically reflect the necessity and trustworthiness factors delineated by Wigmore. The Advisory Committee which drafted the Federal Rules of Evidence in 1972 confirms that evidence coming within the codified exceptions to the hearsay rule all possess "circumstantial guarantees of trustworthiness sufficient to justify nonproduction [and non cross-examination] of the declarant in person at the trial."[38] Moreover, in drafting Residual Exceptions to the hearsay rule (now re-codified in Rule 807), the Advisory Committee specifically required that evidence offered thereunder possess "equivalent circumstantial guarantees of trustworthiness" to those found in the specifically enumerated exceptions in Rules 803 and 804.[39]

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35. John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 503 (1937).

36. 5 WIGMORE, *supra* note 11, § 1422, at 254..

37. There are, for example, psychological studies abound which demonstrate that classically admissible hearsay like that admitted under the "Excited Utterance" exception or other of the traditional "res gestae" exceptions is often highly inaccurate because the senses and processing of the observer-declarant are in a rather chaotic state due the stimulation of the startling event or its immediacy. *See* FED. R. EVID. 803(2) advisory committee's notes (note to ¶¶ 1-2). Excited utterances have historically been considered trustworthy because it was believed that statements made under emotional stress, regarding matters related to the stress, are made without the time for reflection and fabrication. *See* Mortimer J. Adler, Jerome Michael, Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 433-34 (1928). Because of the belief that stress causes a declarant to speak without prevarication, courts have looked favorably upon utterances made under severe stress. *Id.* at 433. Studies performed after the recognition of the exception have shown that stress alters the perception of the observer/declarant, thus rendering her observations questionable in terms of accuracy, but not with respect to sincerity. *Id.* at 433-38. Obviously, the impact of stress on a declarant is an appropriate matter for expert opinion, cross-examination and argument.

38. FED. R. EVID. 803 advisory committee's notes (introductory cmt.).

39. FED. R. EVID. 807. During the codification process for the Federal Rules of Evidence, the hearsay debate focused on two views. The traditional view proposed a general rule barring hearsay subject to a list of codified exceptions, most drawn from

Even a cursory examination of the most used hearsay exceptions in Rules 803 and 804 demonstrate the ubiquity of the necessity and trustworthiness requirements. For example, Rules 803(1) – 803(3) have the common trustworthy characteristic of covering statements that are spontaneous and sufficiently contemporaneous with the facts the statement reports. Present sense impressions[40] are statements made contemporaneous with the event being perceived. Excited Utterances[41] are made while still under the influence of an exciting or startling event and report that event. Statements about then existing mental, emotional, or physical condition[42] are made contemporaneous with the mental impression or the physical condition which provides their trustworthiness, while necessity considerations suggest that the best evidence regarding what someone is thinking or feeling is the statement of that person made while having the relevant thoughts or feelings. Records of Regularly Conducted Activity[43] gain their trustworthiness from the regularity of the methods by which they are made and kept, the sources of the information, the timing of the recording and the fact that business is done relying on such records. Former Testimony is trustworthy because the statement (1) is made under oath, (2) involves the same issues as the case in which it is offered, (3) and presented for the party against whom it will be offered the opportunity to fully develop the testimony while the declarant is under oath. In addition, as in all Rule 804 exceptions, the declarant is unavailable, thereby making the admission of such evidence necessary to a fair determination of the case.

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the common law. The opposing and unorthodox view proposed a rule barring hearsay, tempered by discretion in the trial to admit any hearsay if the judge determined that the proffered hearsay was both reliable and necessary on a case by case basis. The Rulemakers compromised on Rules 801-804, which recognized thirty codified exceptions and the residual exceptions, Rules 803(24) and 803(b)(5) (now recodified in Rule 807), which permit the trial judge to admit hearsay where the judge finds, inter alia, that the proffered hearsay bears circumstantial guarantees of trustworthiness equivalent to the trustworthiness of hearsay admitted under the other, codified exceptions, and where the proffered hearsay is the most probative on the issue for which is offered (necessity). In creating the Residual exception(s), the Rulemakers recognized that no hearsay should be admitted unless it is trustworthy either *a priori* under a codified exception or on an *ad hoc* basis. *See* David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867 (1982).

40. FED. R. EVID. 803(1); *see also* ANTHONY J. BOCCHINO & DAVID A. SONENSHEIN, A PRACTICAL GUIDE TO FEDERAL EVIDENCE: OBJECTIONS, RESPONSES, RULES, AND PRACTICE COMMENTARY 207-08 (8th ed. 2006).

41. FED. R. EVID. 803(2); *see also* BOCCHINO & SONENSHEIN, *supra* note 40, at 209-10.

42. FED. R. EVID. 803(3); *see also* BOCCHINO & SONENSHEIN, *supra* note 40, at 211-12.

43. FED. R. EVID. 803(6); *see also* BOCCHINO & SONENSHEIN, *supra* note 40, at 220-24.

In fact, it was in the context of the former testimony exception to the hearsay rule that the earliest English case considered the idea that the activities of a criminal defendant in procuring the absence of a hearsay declarant were relevant in determining whether that declarant's out-of-court statements were admissible. In 1666, in *Lord Morley's Case*,[44] the House of Lords decided that "if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the examination [(the deposition of the witness)] might be read."[45] Even though there were no Confrontation Clause issues in the England of 1666, the House of Lords seemed to recognize that even if there was procurement of the unavailability of the witness by the defendant, the nature of the out-of-court statement and its reliability should be considered before admitting the out-of-court statement.

B. Forfeiture By Wrongdoing

Against the historical backdrop of the universal reliability and trustworthiness rationale of the hearsay rule exceptions, Federal Rule of Evidence 804(b)(6) is an obvious anomaly. Enacted in 1997, this Rule is the most recent addition to the hearsay exceptions. It is a sub-part of Rule 804 which admits certain out-of-court statements for their truth when the declarant is legally "unavailable" at the time of trial.[46] Rule 804(b)(6) provides that when a party against whom the declarant's out-of-court statements are offered engages or acquiesces in wrongdoing that is intended to, and does, procure the unavailability of the declarant as a trial witness, the declarant's statements are admissible in evidence in both criminal and civil trials.

While neither Rule 804(b)(6) nor its legislative history defines the term "wrongdoing," both provide a basis for federal court interpretation. The Advisory Committee notes that a defendant's actions which cause the unavailability of the witness need not be a criminal. The Committee further adds that the rule applies to the Government and civil parties. According to *United States v. Scott* and other federal court decisions, the unlikelihood (at least in 1997) that the government would engage in violence or coercion to silence a witness indicates that the Rulemakers must have intended that the Rule apply to non-violent situations of undue influence on a witness.[47] Thus, although courts have admitted statements of murdered or intimidated witnesses, they have also admitted statements where the defendant non-violently and non-criminally procured the witness's absence. In *United States v. Ochoa*, the

44. (1666) 6 State Trials 770 (H.L.).

45. *Id.*, *quoted in* Reynolds v. U.S., 98 U.S. 145, 158 (1878); *see also* discussion of *Reynolds infra* notes 70-72 and accompanying text.

46. FED. R. EVID. 804(b)(6); *see also* United States v. Thompson, 286 F.3d 950, 961 (7th Cir. 2002); United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997).

47. 284 F.3d 758, 764 (7th Cir. 2002).

Seventh Circuit stated that if a defendant had allowed a witness to use his phone in order to assist the witness in fleeing, the defendant would be found guilty of wrongdoing.[48] The Seventh Circuit has also stated that the giving of gifts to a witness for the purpose of procuring her absence from trial would qualify as "wrongdoing" under Rule 804(b)(6).[49]

Unlike all other hearsay exceptions, the Forfeiture by Wrongdoing exception is not based on trustworthiness, but rather a combination of deterrence, punishment and equity, and is more fairly described as a sanction for such conduct.[50] Unlike the other Rule 804(b) exceptions to the hearsay rule, there are no requirements in Rule 804(b)(6) for circumstantial indicia of reliability for the statements involved. In essence, Rule 804(b)(6) makes the general 804(a) requirement the sole predicate for admitting a declarant's hearsay statements, as long as wrongdoing is involved.

Rather than enumerating the trustworthiness factors that characterize all the other hearsay exceptions, the Advisory Committee explains that Rule 804(b)(6) operates as a "prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'"[51] According to the Committee, the Rule is designed to deter criminals from wrongdoing which causes the unavailability of adverse witnesses, often by murder or intimidation.[52] By making such activity costly in working, in effect, a waiver of any

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48. *See* 229 F.3d 631, 639 (7th Cir. 2000).

49. *Scott*, 284 F.3d at 763.

50. *See, e.g.*, FED. R. EVID. 804(b)(1) (whereby statements gain their trustworthiness by having been made under oath in a proceeding where the party against whom the statement is offered had the right and similar motive to develop the testimony by the examination of the witness); FED. R. EVID. 804(b)(2) (whereby statements gain their trustworthiness because the statement is made under belief of impending death concerning the cause and circumstances of what the declarant believes to be his or her impending death); FED. R. EVID. 804(b)(3) (whereby statements gain their trustworthiness from having been made at a time when the declarant believed to be against the declarant's pecuniary, proprietary or penal interest); FED. R. EVID. 804(b)(4) (whereby statements gain their trustworthiness from the fact that the declarant makes statements concerning their own personal or family history about which they presumably have accurate information). All of these exceptions require the Federal Rule of Evidence 804(a) predicate that the declarant be unavailable, thereby adding an element of necessity to admitting the statement.

51. FED. R. EVID. 804(b)(6), advisory committee notes (note to subdivision (b)(6)) (citing United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)).

52. Curiously, the drafters of the rule did not define what sort of "wrongdoing" would trigger the operation of the rule. There is no requirement that the "wrongdoing" take the form of a commission of a crime, and leaves to the trial judge to determine what level of wrongdoing is necessary. FED. R. EVID. 804(b)(6). One would think, that in a civil case, the offer of a job to a potential witness that would take her to a country from which they could not be compelled to return for testimony, or compelled to give deposition testimony, done for the purpose of procuring the unavailabil-

hearsay objection to any relevant out-of-court statement the absent witness has ever made. Where the government offers evidence that the criminal defendant intentionally caused the unavailability of the witness, the Rule provides for the admission of any statement made by the witness whose absence has been so procured irrespective of its reliability or trustworthiness.

The lower federal courts have given Rule 804(b)(6) a broad interpretation. The Rule has been held to apply to a person who was merely a potential witness,[53] and courts have found acquiescence of a party in the wrongdoing from the imputation of acts of a party's co-conspirators.[54] Courts have expanded the meaning of the term "wrongdoing" beyond violence and threats to include other kinds of undue influence.[55] Though most federal courts have required the government to show the criminal defendant's intent to make the person who is the subject of the "wrongdoing" unavailable as a witness, all courts have refused to mandate any requirement of trustworthiness, or even any analysis of trustworthiness, concerning the statements of the witness made unavailable by a party's wrongdoing.[56] Thus, Rule 804(b)(6) admits hearsay despite the lack of any trustworthiness in the circumstances surrounding the making of the statement; and the Advisory Committee notes no concern about the admission of such substantive evidence in a criminal or civil case, relying instead on the purpose of the rule to negate, more or less, any advantage a party attempted to gain by making the declarant unavailable for testimony.[57]

Pre-Rule 804(b)(6) case law is likewise largely unconcerned with the lack of reliability of hearsay offered pursuant to this exception's common law predecessor, the "waiver by misconduct" doctrine. In *U.S. v. White*, for example, the defendant argued that prior to admitting evidence from the unavailable (by misconduct) witness, the court should assess the reliability of the proffered hearsay to see if it was at least as reliable as other admissible hearsay. The Court of Appeals disagreed, ruling that no trustworthiness assessment was necessary because the purpose of the Rule was essentially equitable – to assure that the government was no worse off in making its case than it would be if the declarant had not been made unavailable.[58] Requiring such hearsay to be reliable, the court continued, would upset the equitable balance which the Rule seeks to restore.[59] The critical point here, represented by the Advisory Committee comment and the *White* analysis, is the unique aban-

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ity of a witness would fit the rule's definition of "wrongdoing" even though there is no physical or other harm completed or threatened towards the potential witness. *Id.*

53. *See* United States v. Houlihan, 92 F.3d 1271, 1278 (1st Cir. 1996).

54. *See* United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000).

55. *See* United States v. Scott, 284 F.3d 758, 764 (7th Cir. 2002).

56. *See* United States v. White, 116 F.3d 903 (D.C. Cir. 1997).

57. United States v. Thompson, 286 F.3d 950, 962 n.5 (7th Cir. 2002); *White*, 116 F.3d at 911.

58. *White*, 116 F.3d at 911.

59. *Id.* at 912.

donment of any trustworthiness check on the admission of Rule 804(b)(6) hearsay.

A pre-admission analysis of trustworthiness of Rule 804(b)(6) hearsay appears to be replaced by an *a fortiori* argument obtained from the "forfeiture by wrongdoing" exception to the Sixth Amendment Confrontation Clause, long recognized by federal courts.[60] In short, federal courts which recognized the forfeiture exception prior to its codification in 1997, and the 1997 Federal Rules of Evidence codifiers, had been content to support the hearsay exception by analogy to the similar-sounding Sixth Amendment exception.

Because Rule 804(b)(6) cannot be justified as a hearsay exception based on the core purpose of the hearsay rule and its exceptions, i.e., the exclusion of untrustworthy evidence from the fact-finder's consideration, the only remaining rationale for the admission of Rule 804(b)(6) hearsay is the uncritical analogy to the similar exception to the Confrontation Clause. We argue that the price of suspending the ban on the admission of untrustworthy evidence is too high in encouraging criminal convictions and civil verdicts based, as it is, on an unrelated doctrine designed to serve a different purpose. Thus, we turn to the Confrontation Clause and its relationship to the law of hearsay and its exceptions.

C. The Confrontation Clause and Hearsay – Pre-Crawford

The Sixth Amendment Confrontation clause provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[61] According to the United States Supreme Court in an early Confrontation Clause opinion, the Sixth Amendment confrontation requirement was enunciated to prevent the sixteenth century English criminal courtroom practice of trial by *ex parte* affidavit or deposition in lieu of live

60. *See* discussion *infra* pp. 55-58.

61. U.S. CONST. amend. VI. Until 1965, the Confrontation Clause was not binding on the states. Most out-of-court statements which would have posed confrontation issues could also be excluded through the hearsay doctrine. *See* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1011-14 (1998). As a result, the Supreme Court showed little interest in developing a doctrine of the Confrontation Clause regarding the admission of out-of-court statements. *Id.* at 1013. In *Pointer v. Texas*, however, the Court held that the Sixth Amendment right of an accused to confront a witness against her was incorporated by the Due Process Clause of the Fourteenth Amendment and made obligatory upon the states. 380 U.S. 400, 406 (1965). *Pointer* initially seemed to reinvigorate the Confrontation Clause, providing an independent basis to challenge the admissibility of hearsay in state and federal criminal cases. Though cases decided immediately after *Pointer* emphasized the separateness of the hearsay and confrontation doctrines, some later cases intertwined the two doctrines in emphasizing their similarities. Friedman, *supra*, at 1014-15.

testimony from invading the American criminal justice proceeding.[62] In the Court's most recent Confrontation Clause opinion, Justice Scalia traces the roots of the right to Roman law, its presence and derogation under English common law and its inclusion in American and colonial constitutional law concluding that the Clause's purpose is the prevention of trial by *ex parte* "testimony."[63]

Given this historical perspective of the Confrontation Clause, it should be clear that the Confrontation Clause is not a Constitutional check on the admission of hearsay evidence in criminal cases, but rather a narrow historical bar to conviction on secret evidence and/or evidence developed by the state without the participation of the criminal defendant. In fact, in the case of *Dutton v. Evans*, Justice Harlan in his concurrence challenged "the assumption that the core purpose of the Confrontation Clause of the Sixth Amendment is to prevent overly broad exceptions to the hearsay rule [in criminal cases]," stating

> I have since become convinced that Wigmore states the correct view when he says: "The Constitution does not prescribe what kinds of testimonial statements . . . shall be given infra-judicially, – this depends on the law of Evidence for the time being, – but only what mode of procedure shall be followed – i.e. a cross-examining procedure – in the case of such testimony as is required by the ordinary law of Evidence."[64]

Justice Harlan continued:

> [t]he conversion of a clause intended to regulate trial procedure into a threat to much of the existing law of evidence and to future developments in that field is not an unnatural shift, for the paradigmatic evil the Confrontation Clause was aimed at – trial by affidavit – can be viewed almost equally well as a gross violation of the rule against hearsay. . . . But however natural the shift may be, once made it carries the seeds of great mischief for enlightened development in the law of evidence.[65]

Justice Harlan then concluded that there was nothing in the Sixth Amendment to "connote a purpose to control the scope of the rules of evi-

62. Mattox v. United States (*Mattox II*), 156 U.S. 237, 242-43 (1895); *see also* Leslie Morsek, Note, Lilly v. Virginia*: Silencing the "Firmly Rooted" Hearsay Exception with Regard to an Accomplice's Testimony and Its Rejuvenation of the Confrontation Clause*, 33 AKRON L. REV. 523, 527 (2000).

63. Crawford v. Washington, 541 U.S. 36, 42-50 (2004).

64. 400 U.S. 74, 94 (1970) (Harlan, J., concurring) (quoting 5 J. WIGMORE, EVIDENCE § 1397, at 131 (3d ed. 1940)).

65. *Id.* at 94-95 (footnote omitted).

dence."[66] For Harlan, then, discussing confrontation and hearsay was akin to discussing apples and oranges.

In fact, in *Dutton*, the Court stated that while confrontation is ordinarily required to test the reliability of evidence, otherwise reliable evidence need not be confronted. That is, the law of Confrontation Clause and the law of hearsay act as different controls on the admissibility of evidence. This view, later elaborated in *Ohio v. Roberts*, holds that not all hearsay need be confronted, i.e., confrontation and compliance with many hearsay exceptions are alternative means to admit evidence consistent with the Sixth Amendment.[67]

A second, alternative historical analysis of the Confrontation Clause also divorces it from the hearsay rule, arguing that the Clause is not concerned with accuracy in the truth telling process, but rather in the desire to grant the criminal defendant a meaningful advocate for his position and to challenge official authority.[68] This is accomplished through cross-examination of witnesses by competent counsel. Whether we adopt the now dominant view that the exceptions to the rule precluding hearsay are not limited by the right to confrontation,[69] or the alternative historical narrative, there is no support for a simple analogy from Confrontation Clause analysis to hearsay analysis. They are, in fact, historical apples and oranges.

How then did these apples and oranges become conflated? Prior to *Crawford v. Washington*, the U.S. Supreme Court's jurisprudence in cases considering the interplay of the Confrontation Clause and the hearsay rule led to this complicated conclusion. Forfeiture by wrongdoing, as a concept, was first recognized by the Supreme Court in the 1878 case of *Reynolds v. United States*.[70] In *Reynolds*, the Court determined that a criminal defendant could not complain about his right to cross-examine a witness in whose absence he was complicit.[71] Once the Court found that Reynolds had forfeited his right to confront the witness, the Court went on to discuss the circumstances of the former testimony of the witness and, in an apparent consideration of the hearsay nature of the former testimony, determined that the proffer of the testi-

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66. *Id.* at 95.

67. 448 U.S. 56, 65-66 (1980).

68. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 82 (1995).

69. *See* White v. Illinois, 502 U.S. 346, 363-64 (1992) (Thomas, J., concurring).

70. 98 U.S. 145 (1878).

71. *Id.* at 158. Reynolds was on trial for bigamy, and apparently assisted in causing the absence of one of his wives. *Id.* at 146, 148-50. The court does not speak of wrongdoing, but concludes that because the witness was residing with Reynolds, and because Reynolds told a sheriff who attempted to serve a subpoena on the witness, that he (Reynolds) would not tell the sheriff where the witness was, that Reynolds had waived his right to confront the testimony of the witness which had been given in a earlier trial charging Reynolds with bigamy under a different set of facts (different multiple wives involved). *Id.* at 158-61.

mony was "within the well-established rules."[72] In *Reynolds*, the Court implicitly recognized that the Confrontation Clause issue and the hearsay issue were distinct; that is, the fact that Confrontation rights were met did not excuse the need to consider whether a statement passed hearsay muster. Unfortunately, waters would become murkier.

In its first opinion explicitly addressing the interplay of the Confrontation Clause and the law of hearsay thirty-five years ago, the Court stated that although the Clause and the hearsay rule address similar and, to some extent, overlapping values, the two doctrines "are not co-extensive."[73] The Court restated this position in nearly all of its later decisions and has taken pains to explain that proffered evidence that violates hearsay prohibitions does not per force violate the Confrontation Clause, *and* proffered evidence that violates the Confrontation Clause does not, per force, violate the hearsay rule.[74] As a result, the Court on many occasions has affirmed the admission of hearsay despite the inability of the criminal defendant to actually, figuratively or virtually confront his or her accuser;[75] on other occasions the Court has endorsed the bar on admission of otherwise "admissible" hearsay (i.e., hearsay which fits within one of the many exceptions to the hearsay rule) because such hearsay, though deemed reliable and necessary by common law judges and later rules codifiers, fails to guarantee the accused's right to face-to-face confrontation with the absent hearsay declarant.[76]

Despite the Court's many holdings on the topic, and the repeated protestations that Confrontation Clause and hearsay analyses involve two different (albeit sometimes overlapping) doctrines, over time those distinctions seemed to essentially blur, and finally identify, the test of one with the other. In *California v. Green*, the Court first noted that the Confrontation Clause and the hearsay rule often overlapped, but were not identical, and then ruled that admissible hearsay may only be admitted over the Confrontation Clause objec-

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72. *Id.* at 161. Although the court did not specifically state that it was considering whether the out-of-court statement met an exception to the hearsay rule, the analysis performed makes clear that is exactly what was being done. About the out-of-court statement the court stated:

> It was testimony given on a former trial of the same person for the same offence, but under another indictment. It was substantially testimony given at another time in the same cause. The accused was present at the time the testimony was given, and had full opportunity of cross-examination. This brings the case clearly within the well-established rules.

Id. at 160-61. In so doing the Court tracked the requirements for the admissibility of former testimony, a well recognized exception to the hearsay rule currently codified in Federal Rule of Evidence 804(b)(1).

73. California v. Green, 399 U.S. 90 (1970).

74. *See, e.g.*, United States v. Inadi, 475 U.S. 387, 393 n.5 (1986); Dutton v. Evans, 400 U.S. 74, 81 (1970).

75. United States v. Inadi, 475 U.S. 387, 393 n.5 (1986); *see also, e.g.*, Ohio v. Roberts, 448 U.S. 56 (1980).

76. *E.g.*, Idaho v. Wright, 497 U.S. 805 (1990).

tion of the criminal defendant as long as the hearsay declarant is present in court and subject to cross-examination.[77] That is, admissible hearsay would be excluded as a confrontation matter unless the confrontation right is met by the opportunity to cross examine. To put it another way, qualifying as admissible hearsay is insufficient to overcome a Sixth Amendment objection.[78]

Despite recognizing the apparent overlap of the Confrontation Clause and the hearsay rule, the *Green* Court's holding demonstrates the *separation* of Confrontation Clause and hearsay analyses in two ways. First, while the hearsay rule would allow the admissibility of statements not confronted at the time of their making pursuant to an exception to that rule, confrontation concerns still require confrontation with the hearsay declarant, not at the time of the making of the statement, but by cross-examination at trial. That is, the confrontation right requires more than the existence of reliable hearsay pursuant to an exception to the rule. Second, in resolving the Confrontation Clause issue merely by requiring cross-examination of the hearsay declarant at trial, the Court drew a clear distinction between the Confrontation Clause and the law of hearsay. This is so because the mere availability of a hearsay declarant for cross-examination does not make the declarant's out-of-court statement admissible pursuant to an exception to the hearsay rule. Except for statements admissible pursuant to Federal Rules of Evidence 801(d)(1), the presence of the hearsay declarant in court is irrelevant.[79] Either the hearsay is sufficiently reliable to meet an exception to the hearsay rule or it is not. The mere ability to cross-examine the hearsay declarant at trial does not make out-of-court statements trustworthy enough to create an exception to the hearsay rule. *Green* makes clear that the key inquiry for Confrontation Clause analysis is the opportunity for cross-examination of the witness (who may also be a declarant of trustworthy hearsay), while the key inquiry for hearsay analysis is the trustworthiness of the statement (the maker of which may or may not be available for cross-examination).

Despite *Green*'s general thrust against courts conflating the Confrontation Clause with the hearsay rule, *Ohio v. Roberts* took a significant step toward completely identifying one with the other. In *Roberts*, the Court announced a two-part test for the admissibility of otherwise admissible hearsay over the Confrontation Clause objection of a criminal defendant: (1) the government must produce the hearsay declarant in court for purposes of cross-examination; and (2) the statement must have been made under circumstances

77. 399 U.S. 149, 158 (1970).

78. *Id.* at 164.

79. In order for statement to be admissible pursuant to Federal Rule of Evidence 801(d)(1), the hearsay declarant must be available at trial for cross-examination, *and* the statement must be (a) inconsistent with trial testimony and given under the pains of perjury; (b) consistent with trial testimony and offered to rebut an express or implied allegation of recent fabrication or improper motive or influence; or (c) a statement of identification of a person made after perceiving that person.

providing sufficient guarantees of trustworthiness.[80] Trustworthiness could be shown if either the statement fell within one of the historically "firmly rooted hearsay exception[s]" or there were "particularized guarantees of trustworthiness" of the statement.[81]

Thus, after *Roberts*, the admission of hearsay did not violate the Confrontation Clause if the hearsay was trustworthy and the declarant was either present in court for cross-examination or practically impossible to produce. *Roberts*, then, identified the Confrontation Clause standard with the basic principle of admitting only reliable evidence and obviated the Confrontation Clause requirement (as it existed in *Green*) of actual or virtual "confrontation" with the hearsay declarant at trial. When the Court removed the need for the government to demonstrate the unavailability of the hearsay declarant whose statements the government sought to admit in *U.S. v. Inadi*,[82] it would seem that, despite the Court's protestations to the contrary, in cases where the government sought to introduce hearsay against a criminal defendant, the identification of the Confrontation Clause and hearsay tests for admissibility was nearly complete. In other words, once the government made a showing that the proffered testimony was trustworthy of the hearsay it offered as required by *Roberts*, the Confrontation Clause posed no independent bar to unconfronted testimony.

Just as hearsay analysis after *Roberts* drove Confrontation Clause analysis, one aspect of Confrontation Clause analysis was applied to the law of hearsay in the context of the "forfeiture by wrongdoing" doctrine. Pursuant to that doctrine, a criminal defendant could not complain of the inability to confront a witness whose absence the criminal defendant had procured.[83] Essentially, the doctrine provided that once a criminal defendant had procured the absence of a witness from trial, that criminal defendant forfeited the right of confrontation afforded by the Sixth Amendment. The forfeiture doctrine was essentially one of equity, whereby a criminal defendant could not benefit by eliminating evidence that would have been produced by a witness but for the actions of the criminal defendant. The courts, when analyzing the offer of statements from the witness made unavailable by the defendant, answered the defendant's objection to hearsay on essentially the same grounds.[84] Because the witness was unavailable due to the wrongdoing of the

80. Ohio v. *Roberts*, 448 U.S. at 66 (1980).

81. *Id.*

82. United States v. Inadi, 475 U.S. 387, 400 (1986).

83. United States v. Aguiar, 975 F.2d 45, 47-48 (2d Cir. 1992) (waiver applied where defendant threatened a witness); United States v. Miller, 116 F.3d 641, 667-68 (2d Cir. 1997) (waiver applied where defendant killed a witness); Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir. 1982) (waiver applied where court found that defendant was controlling witness through her attorney).

84. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982) (ruling that a waiver of one's Sixth Amendment Rights is an *a fortiori* waiver of one's

criminal defendant, courts applied the same equity principles to the criminal defendant's objections based on hearsay grounds and disallowed them. It is the integration of a Confrontation Clause doctrine into the law of evidence regarding hearsay exceptions that is embodied in Federal Rule of Evidence 804(b)(6). Thus, there appeared to be a certain symmetry. After *Roberts*, hearsay analysis answers a Confrontation Clause issue, and for Rule 804(b)(6) Confrontation Clause analysis answers a hearsay issue. We argue that both parts of the equation are flawed, and that flaw was made clear by the court in *Crawford v. Washington* and its progeny.

D. The Confrontation Clause and Hearsay – Post-Crawford

In 2004, the U.S. Supreme Court wrote a new chapter in its Confrontation Clause jurisprudence in the case of *Crawford v. Washington*.[85] In *Crawford* the Court essentially adopted the concurring view of Justice Thomas in *Illinois v. White* that hearsay exceptions are limited by the evolving right of confrontation.[86] The sweeping new rule provided that when hearsay being offered by the government is "testimonial" in nature, it is inadmissible - irrespective of its trustworthiness or admissibility pursuant to a hearsay exception- unless the criminal defendant has had or will have an opportunity to cross-examine the statement and its maker either at the time it was made or in court.[87] Thus, at least for "testimonial" hearsay, the Court decoupled hearsay and the reliability factors of its exceptions from Confrontation Clause analysis. It was not clear *Crawford* whether the Court was announcing a new Confrontation Clause test for "testimonial" hearsay only, thus leaving the *Roberts* test in place for non-testimonial hearsay. However, Court's later pronouncement in *Davis v. Washington* states the narrow view that the Confrontation Clause does not apply at all to non-testimonial hearsay, and that the Clause is only implicated when the government attempts to offer testimonial hearsay, in which case the *Crawford* test applies.[88]

In *Davis* and its companion case,[89] the Court was presented with two scenarios involving allegations of spousal abuse. Rather than focusing on the reliability and trustworthiness requirements of hearsay analysis, the Court considered only the totality of the circumstances in obtaining the statement alleging spousal abuse to determine whether or not the statements were "testimonial" and therefore required the Confrontation Clause requirement of

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hearsay objection); United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979); United States v. White, 116 F.3d 903, 912 (D.C. Cir. 1997).

85. 541 U.S. 36 (2004).

86. *See id.* at 60-61; White v. Illinois, 502 U.S. 346, 358-66 (1992) (Thomas, J., concurring).

87. *Crawford*, 541 U.S. at 68.

88. 126 S. Ct. 2266, 2273 (2006); *see also* discussion of *Davis*, *infra* pp. 59-60.

89. *See* Hammon v. Indiana, 829 N.E.2d 444 (Ind. 2005).

cross-examination by the criminal defendant.[90] The Court left for hearsay analysis whether the statements in question were sufficiently trustworthy and reliable to rise to the level of a hearsay exception and could thus be admissible in the face of an objection on hearsay grounds. In other words, the admissibility of the out-of-court statement per the Confrontation Clause is determined by (1) whether the proffered hearsay is "testimonial" and (2) whether it has been or will be cross-examined. If it is testimonial, the only issue is cross-examination, not reliability. If the statement is non-testimonial, the Confrontation analysis is inappropriate.

A straightforward reading of *Crawford* and *Davis* leads one to believe that the Court, in its opinions, was both expanding and contracting the protection afforded criminal defendants by the Confrontation Clause. On the one hand, the Court seemed to narrow the Clause's reach by confining its exclusionary ban to "testimonial" hearsay. At the same time, the Court ruled that if the government offers "testimonial" hearsay against the criminal defendant, it will be automatically excluded even if it is highly reliable (i.e., it falls within one of the enumerated exceptions or the residual exception to the hearsay rule) and even if the declarant is legitimately unavailable, if the requirement of cross-examination was not met at either the time of making the hearsay statement or at the time of trial.

It appears, therefore, that *Crawford* and *Davis* stake out a middle ground position between the majority *Dutton* and *Roberts* view and that of Justice Harlan in his concurrence in *Dutton* and Justice Thomas in his dissent in *White*. The *Dutton/Roberts* view is that so long as the proffered hearsay meets the reliability and trustworthiness tests of the hearsay rule, Confrontation Clause concerns are met for all hearsay statements offered by the government. The Harlan-Thomas position is that the offer of hearsay does not amount to a calling of a witness to give testimony at all, thus obviating the need for Confrontation Clause analysis. The *Crawford/Davis* view finds that the offer of "testimonial" hearsay obtained by the government is the functional equivalent of live testimony, thus requiring Confrontation Clause testing by cross-examination, while "non-testimonial" hearsay is too far removed from the paradigm of state-elicited hearsay (e.g., affidavits, depositions) to raise Confrontation Clause concerns.

The functions, then, of the Confrontation Clause and the hearsay rule are separate and distinct. The Confrontation Clause concerns itself with the need for cross-examination of the declarant before his or her "testimonial" hearsay can be offered by the government, thereby focusing on the maker of the hearsay declaration. The hearsay rule and its exceptions focus not on the examination of the hearsay declarant but rather on the reliability and trustworthiness of the statement itself at the time it was made out of court. This distinction is significant when considering the admissibility of statements made by a

90. *Davis*, 126 S. Ct. at 2273.

person whose unavailability has been intentionally procured by the wrongdoing of a party.

To the extent that the common law Forfeiture by Wrongdoing hearsay exception and its codified exception in Rule 804(b)(6) are rationalized as merely an analogue to the forfeiture by wrongdoing doctrine excusing Confrontation, such analogy is misplaced. Given the differences between the functions of the Confrontation Clause and the hearsay rule, and the fact that the Confrontation Clause no longer applies to "non-testimonial" hearsay, it makes little sense to argue that forfeiture of the Constitutional right to confront a witness by the criminal defendant through cross-examination somehow requires equivalent forfeiture of the reliability and trustworthiness requirements of an hearsay exception regarding non-testimonial hearsay.

But what of "testimonial" hearsay? After *Crawford* and *Davis*, the hearsay declarant must be cross-examined at the time of the making of the hearsay statement or at the time of trial. This finding in no way impacts the totally independent hearsay analysis. Even after *Crawford* and *Davis*, once the Confrontation Clause problem is cured through cross-examination, the hearsay problem remains. Nothing in the curing of the Confrontation Clause issues presented by "testimonial" hearsay cures the potential that the proffered hearsay is unreliable and untrustworthy, and therefore inadmissible as against a hearsay objection. Neither *Crawford* nor *Davis* reaches this issue or pretends to answer it. And in *Davis* the Confrontation Clause analysis taken place in the context of statements that were already determined to be admissible as against a hearsay objection. Why then should answering the Confrontation Clause problem by the Forfeiture by Wrongdoing doctrine also answer the hearsay question? The answer clearly is that it should not. The Sixth Amendment forfeiture rule does not pretend to foster the admissibility of reliable evidence. It simply makes the rather obvious and legally appropriate point that the inability of the criminal defendant to confront his accuser is not a constitutional problem when the "confronter/defendant" chooses to intentionally make the accuser unavailable.

Absent the sanctioning effect of Rule 804(b)(6), however, the offering party would have to demonstrate that the statements of the unavailable witness meet the reliability and trustworthiness requirements of the exceptions to the hearsay rule which are designed to ensure that civil verdicts and criminal convictions are based on reliable evidence. We have already demonstrated that nothing in the requirements of Rule 804(b)(6) purports to guarantee that the out-of-court declarations of a witness whose unavailability has been procured by a party have any of the guarantees of trustworthiness that underlie all of the law of evidence.[91] The Rule clearly is designed to be, and is, punitive in nature and effects a sanction on parties that intentionally procure witness unavailability.

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91. *See supra* Part II.B.

The first question then becomes what sorts of evidence will Rule 804(b)(6) allow to form the factual predicate for civil and criminal justice system decision making? We will attempt to answer that question in Part III of this Article through the examination of two hypothetical situations. Secondly, absent Rule 804(b)(6), would the conduct of procuring witness unavailability be rewarded and go unsanctioned? We will show that it would not in Part IV.

III. THE OPERATION OF THE FORFEITURE BY WRONGDOING RULE

Assume the following cases are being heard in a federal courthouse. In Judge Williamson's courtroom, the case of *U.S. v. Jones* is being tried. Albert Jones, the defendant, has been charged with the murder of Harry Gebippe on federal property. In Judge Rush's courtroom across the hall, the case of *Allen v. Acme Corporation* is on trial. In this diversity action, Allen claims that he was injured when an improperly designed and manufactured buzz saw malfunctioned, exploded and caused permanent scarring to his face.

Judge Williamson is faced with the following issue. As the government prepares its case for trial, Jane Pierce, the defendant Jones's former girlfriend and only eyewitness to the alleged murder, disappears. Prior to her disappearance, Ms. Pierce, who had been jilted by the defendant, had told a friend that she had been with the defendant at the time of the murder and saw him shoot Mr. Gebippe. This conversation took place in a bar as part of a casual conversation in which the obviously intoxicated Pierce was complaining about the ending of her relationship with the defendant. Even so, Pierce described the killing of Gebippe by Jones, and told her girlfriend that if anything happened to her, it was probably Jones's doing. Prior to her disappearance, the government's lawyers knew that although Pierce could, of course, testify to her observations at the time of the crime, the government could make no colorable argument for the admission of Pierce's statement to her friend in the bar.

After the disappearance of Pierce, the government made a deal with a jail house informer, Mr. Jamison. Jamison was a convicted bank robber, who offered the following testimony. Jamison told the government's lawyers that several weeks earlier he had a conversation with another inmate, Smith. According to Jamison, Smith (who has since been convicted of perjury in an unrelated matter) told Jamison that the defendant had admitted to Smith that the defendant had made his former girlfriend disappear and that, therefore, the defendant expected to be acquitted of the murder charge against him. According to Jamison, Smith said that he had asked the defendant what he meant by "disappear" and that the defendant just smiled and said, "she's not coming back, not now, not ever." When the government's lawyers interviewed Smith, Smith denied that the defendant had made any such statement to him.

Judge Williamson is considering whether Pierce's barroom statement implicating the defendant in Gebippe's murder should be admitted into evi-

dence pursuant to Rule 804(b)(6) for its truth in the defendant's trial for murder. By applying the relevant Federal Rules of Evidence, the answer is an emphatic yes. Rule 804(b)(6) allows the hearsay statements of a witness to be admitted into evidence if the unavailability of that witness was intentionally procured by the wrongdoing of a party.[92] But, one might protest, all that is available to prove the foundational requirements of Rule 804(b)(6) is a statement made by Smith to Jamison. Smith denies making the statement, and Jamison has made an almost favorable plea bargain in return for this foundational testimony. And further, the alleged statement of Pierce to her friend contains no circumstantial guarantee of trustworthiness.

However, under the Federal Rules of Evidence, the government can easily establish the requisite foundation for the admissibility of Pierce's unreliable hearsay statement to her friend implicating the defendant in the murder of Mr. Gebippe. To begin with, Federal Rule of Evidence 104(b) provides that in order to establish the foundational requirement of Rule 804(b)(6) (that the defendant intentionally procured the witness's unavailability), the proponent must only point to evidence sufficient for the court to determine that a jury could find that the foundational fact exists by a preponderance of the evidence.[93] And when making a decision regarding the admissibility of evidence, Rule 104(a) provides that the court is not bound by the law of evidence except with regard to privilege.[94]

Thus, the judge could consider that the convicted bank robber, having made a favorable plea bargain, received information that the defendant intentionally made his former girlfriend unavailable for trial testimony from a convicted perjurer (who denies providing that information). After doing so, the judge would be free to determine that a jury could find by a preponderance of the evidence that the foundational requirement of Rule 804(b)(6) regarding the untrustworthy hearsay of the former girlfriend had been met. The jury would then be permitted to hear the testimony concerning Pierce's alleged statement the alleged statement,[95] on which a conviction for the crime of murder could result.

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92. FED. R. EVID. 804(b)(6).

93. FED. R. EVID. 104(b) ("When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.").

94. FED. R. EVID. 104(a) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.").

95. The fact that the declarant had a bias against the Defendant and was intoxicated at the time of the alleged statement implicating the Defendant would likewise not affect the admissibility of this testimony, although such facts would be admissible pursuant to Rule 806 to impeach the credibility of the hearsay declarant.

Note as well that Rule 403[96] provides no protection from the admission of wholly unreliable hearsay because the out-of-court statement is obviously highly probative and in no way unfairly prejudicial. Once the judge determines that the government has met its minimal foundational burden of witness intimidation, the judge would have no discretion to exclude the unavailable witness's relevant Rule 804(b)(6) statements. In other words, if the government offers any evidence, including uncorroborated and impeachable hearsay, that the defendant intentionally procured the unavailability of the witness for trial testimony, any relevant hearsay statement made by the unavailable witness is admissible for its truth against the defendant at his criminal trial. Indeed, this hearsay, with no circumstantial guarantees of trustworthiness, could be the only substantive evidence of the defendant's guilt.

Meanwhile, in the courtroom across the hall, Judge Rush is faced with the following problem in the civil action *Allen v. Acme*. This case involves employment discrimination with the following facts.

One of the designers of the buzz saw that allegedly malfunctioned was Helen Butler. According to the employment records of Ms. Butler, she was fired by Acme because she had used sexist remarks in the workplace with regard to male interns which had allegedly created a hostile work environment. Ms. Butler had considered filing a lawsuit over the firing, and even made her intentions known to her supervisors at Acme.

Right after her firing, Ms. Butler had a conversation with a friend of hers, John Caruthers, who worked as a design engineer for another company that competed with Acme. Butler told Caruthers that she believed the grounds claimed by Acme for her firing were a pretext, and that the real reason she was fired was that she had protested about the design of the buzz saw that had allegedly malfunctioned (for technical reasons that were understood by and could be explained by Caruthers). Butler shared with Caruthers her view that the design might likely cause exactly the sort of explosion that injured Mr. Allen, but that she dropped her protest because of pressure from her supervisors. As to the timing of her firing, Butler said that she had heard of the Allen lawsuit and heard through the grapevine several weeks before she was fired that Allen's lawyers wanted to take sworn depositions of the design team at Acme.

After several months, Butler and Caruthers met again. Butler told Caruthers that, due to a glowing recommendation from her former boss at Acme (the same boss who had fired her), she got a job at about three times her former salary with the Saw-It Corporation. The only catch was that she was required to move to a South American country (one which it turns out has no treaty providing for the compelled deposition testimony of its citizens regard-

96. FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

ing U.S. lawsuits) and that she had to commit to a minimum six-year term of employment. The commitment was such that should she fail to abide by it, she would be compelled to re-pay an extremely large bonus. As it turns out, the Saw-It Corporation is a family business belonging to the brother-in-law of the president of Acme.

As luck would have it, Caruthers was hired as an expert witness for Mr. Allen in his case against Acme. Caruther's expert report is based, in part, on the statements made to him by Butler regarding the design of the buzz saw in question- statements that are inconsistent with the deposition testimony of the rest of the Acme design team.

Acme has filed a motion in limine to exclude any reference to the Butler statements as they are inadmissible hearsay which could, in all likelihood, be considered by Caruthers and reasonably relied upon in forming his opinion, but cannot be disclosed to the jury by the terms of Federal Rule of Evidence 703.[97] Allen has responded by saying that the statements of Butler are admissible as against a hearsay objection because they fall within Rule 804(b)(6).

Again considering the operation of the Federal Rules of Evidence, Judge Rush will likely rule that the jury can hear and consider the statements of Butler as part of the basis for the Caruthers opinion, and also consider the Butler statements. This is so even though the maker of the statements was a disgruntled former employee at the time she made the statements in question; there is no hearsay exception that would otherwise allow for the admission as reliable or trustworthy hearsay; and the reporter of the statements is the paid expert of the opposing party.

Applying Rule 804(b)(6) and Rule 104, the following analysis by Judge Rush would certainly survive a claim of abuse of discretion should she allow Caruthers to testify as to the statements made to him by Butler. The predicate for allowing Caruther's testimony regarding Butler's statement is a finding that Butler's unavailability as a witness was intentionally procured by the wrongdoing of Acme. To begin with, Rule 804(b)(6) applies to civil as well as criminal cases.[98] There is no requirement that the "wrongdoing" required by Rule 804(b)(6) be criminal in nature. Although the Advisory Committee's comments to the rule speak in terms of witness intimidation and harassment (criminal acts to be sure), that same Committee intentionally wrote the rule in

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97. FED. R. EVID. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.").

98. The authors have been unable, however, to locate any reported opinion regarding the admissibility of Rule 804(b)(6) statements in a civil case.

terms of "wrongdoing" and not "criminality." The only fair reading of the statute is that it was meant to cover non-criminal "wrongdoing" as well as criminal "wrongdoing" as the impermissible means for procuring witness unavailability.

Applying Rule 104 to the evidence of Acme's wrongdoing, Judge Rush could easily find sufficient evidence that a jury could find the predicate facts for admissibility of Rule 804(b)(6) statements here by inferring that Butler's new job: (1) was procured from a relative of the Acme president, (2) in a place where Butler was not required to give deposition testimony, and (3) for a long enough period to effectively preclude her from providing testimony in the Allen case. All of this was done after Acme had notice that discovery of its buzz saw design team (including Ms. Butler) was being sought by Allen's lawyers. While there are alternative reasons for the Butler job in South America,[99] Judge Rush could certainly find the quantum of proof necessary to admit the evidence under Rule 804 (b)(6). This finding would allow the admission of Butler's statements despite no indicia of trustworthiness, the fact they were given while she was contemplating a law suit against Acme, and that their reporter is a paid expert witness for the opposing party. And this testimony would be allowed despite the fact that, but for Rule 804(b)(6), Caruthers would be precluded by Rule 703 from informing the jury of this evidence. All of this is so, despite the fact that the hearsay exception of Rule 804(b)(6) is predicated on a doctrine borrowed from an analysis of the Confrontation Clause, which, of course, is inapplicable in civil cases.

We now turn to an analysis of whether, but for Rule 804(b)(6), parties in civil and criminal cases would go unsanctioned for procuring the unavailability of trial witnesses and, moreover, be allowed to benefit from such conduct.

IV. ALTERNATIVES TO FORFEITURE BY WRONGDOING

For all of the infirmities of Rule 804(b)(6) in its application and results, its application does theoretically serve the legitimate purpose of discouraging parties in criminal and civil cases from intentionally procuring the unavailability of witnesses. A party with knowledge of the rule would be deterred from such conduct with the result that witnesses would be protected from potential harm. This we acknowledge. The question we ask, however, is whether the rule is necessary in either our criminal or civil justice systems. We suggest, respectfully, that necessity is not demonstrated by the questions and answers we pose below.

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99. The Acme motive for the recommendation could have been to avoid the employment law suit Butler had threatened against Acme (a legitimate offer of compromise). It might be difficult to get qualified engineers in this South American country which can explain the wage differential and job bonus, and the minimum six year term may be merely a means to keep qualified engineers in the fold at Saw-It Corporation.

First, if the wrongdoing activity by a party is to be discouraged, is the best way of doing so to allow criminal and civil trials to be decided on consideration of untrustworthy evidence, i.e., hearsay that does not meet any of the exceptions to the hearsay rule? The answer is no. Our justice system can remedy the evil of procuring the unavailability of witnesses by wrongdoing in other, more appropriate ways. There are alternative legal methods – preferable to Rule 804(b)(6) – which will effectuate the same equitable outcome. That is, the law of evidence affords other, more principled methods which would achieve the same goal.

A. Discouraging the Behavior Sanctioned by Rule 804(b)(6)

1. Use of the Criminal Law

We begin with the Commentary of the Advisory Committee regarding Rule 804(b)(6). According to that Commentary, the Rule operates as a "prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'"[100] But it does so at the expense of admitting unreliable hearsay.

We suggest that another way to achieve the prophylaxis sought by the Advisory Committee is to resort to the criminal law. The very "abhorrent behavior" described by the Advisory Committee falls properly within a number of federal criminal statutes.[101] If what is desired is a sanctioning of behavior, the appropriate, best and most certain way of doing so is through the use of criminal sanctions. The crime of Tampering With a Witness, Victim or an Informant[102] is one such federal criminal statute that adequately and fairly performs this precise function. This and other federal statutes, as well as their state counterparts provide substantial criminal sanctions for their violation. For example, 18 U.S.C. § 1512, which makes it criminal to "prevent the attendance or testimony of any person in an official proceeding," provides the following penalties:

(1) if the method of prevention of testimony is killing – life imprisonment or the death penalty;[103]

(2) if the method of prevention of testimony is attempting to kill – up to 20 years imprisonment;[104]

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100. FED. R. EVID. 804(b)(6), advisory committee notes (note to subdivision (b)(6)) (citing United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)); *see also supra* note 51 and accompanying text.

101. Although we will discuss federal crimes, the activity proscribed by these crimes is also proscribed in most, if not call, criminal codes. Obstruction of justice, witness tampering and witness intimidation are not tolerated in any jurisdiction.

102. 18 U.S.C. § 1512 (2000).

103. *Id.* § 1512(a)(3)(A).

104. *Id.* § 1512(a)(3)(B)(i)-(ii).

(3) if the method of prevention of testimony is use of physical force – up to 20 years imprisonment;[105]

(4) if the method of prevention of testimony is the threat of physical force – up to 10 years imprisonment;[106]

(5) if the conduct used to prevent testimony is corrupt persuasion with the intent of preventing testimony – up to 10 years imprisonment;[107]

(6) if the conduct used to prevent testimony is harassment – up to 1 year imprisonment and a fine.[108]

In addition, each of the acts complained of in the context of preventing a witness from providing testimony are, themselves, criminal - encompassed by crimes such as murder, attempted murder and assault.

Turning to our hypothetical fact patterns in Part III, if the defendant in the case of *U.S. v. Jones* had in fact prevented the testimony of Ms. Pierce, and her "disappearance" was due to his having her killed, that conduct would be punishable under 18 U.S.C. § 1512 by either the death penalty or life imprisonment.[109] And, because the defendant would have also committed murder, he would also be liable for the penalties attendant to that crime. If, however, the "disappearance" of Ms. Pierce was accomplished by other methods, lesser penalties under 18 U.S.C. § 1512 would apply, as would penalties for lesser crimes themselves. In the case of *Allen v. Acme*, if, in fact, Ms. Butler's unavailability for testimony was accomplished in the manner described in the hypothetical, those persons responsible for her unavailability due to "corrupt persuasion" would be punished with up to one year imprisonment and a fine.

Criminal penalties apparently have a sufficient deterrent effect for most civil and criminal parties to lawsuits. After all, the vast majority of parties never resort to witness intimidation. Thus, for most litigants, Rule 804(b)(6) is patently unnecessary. Indeed, it is hard to imagine that any significant number of litigants even know of the Rule's existence. Accordingly, only a tiny number of parties (who are aware of the Rule) are probably deterred by the rule. Thus, realistically, the Rule's only rationale is one of equity, i.e., not permitting the wrongdoer to obtain a significant litigation advantage by her own wrongdoing.

The criminal law is encumbered by the universal standard of guilt beyond a reasonable doubt (as opposed to the preponderance standard for the Rule 804(b)(6) predicate). Reliance on the criminal law, particularly when the tampering charge is joined in the same prosecution with the underlying charges, however, may have just as serious if not more serious impact on the defendant's case than the admission of the missing witness's hearsay. After

105. *Id.* § 1512(a)(3)(B)(ii).
106. *Id.* § 1512(a)(3)(C).
107. *Id.* § 1512(b).
108. *Id.* § 1512(d)(4).
109. *Id.* § 1512(a)(3)(A).

all, the "spill-over" effect of the tampering charge with its concomitant expansion of the admission of harmful evidence under Rule 401 will ordinarily seriously strengthen the government's case. Finally, reliance on the criminal law will often trump the effect of Rule 804(b)(6) by performing the equitable function of the Rule without sacrificing the core value of the avoidance of verdicts based on unreliable evidence on unreliable evidence.

We cannot forget, as well, the ability of the trial judge to invite the jury to make a negative inference from facts supporting witness interference even in the absence of a witness tampering charge. As the Sixth Circuit has noted: "[t]he fact that [the] defendant attempted to bribe and threaten an adverse witness indicates 'his consciousness that his case is a weak . . . one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.'"[110] Thus, by using either the substantive criminal law or the precatory jury instruction and resulting inference, the court, in the absence of Rule 804(b)(6), has ample authority to re-level the playing field which has been upset by the defendant's wrongdoing without resort to opening the doors of the courtroom to the rankest and least reliable hearsay.

Not only is this evidence heard by the jury, but, in addition, the judge will instruct the jury as to the precise purpose for which the evidence may be considered. Surely an instruction by the judge that the jury may infer from the act of intimidation or attempted intimidation of a witness that the defendant was conscious of his guilt of the crimes with which he is charged is a better remedy for those acts than the inclusion for jury consideration of unreliable evidence such as that allowed pursuant to Rule 804(b)(6).

2. Civil Sanctions

Rule 804(b)(6) applies, by the letter of the rule, to civil as well as criminal cases. Although the factual circumstances in which the need for the sanctioning effect of Rule 804(b)(6) are likely more rare in civil cases,[111] it is available, and can be utilized in cases similar to the not so far-fetched example our civil hypothetical provides. But in reality, the same sanctioning effect of Rule 804(b)(6) can be effectuated with greater precision by operation of the Federal Rules of Civil Procedure,.

Federal Rule of Civil Procedure 37 provides a federal judge with a wide range of sanctions for the failure of a party to comply with, or cooperate in the discovery process.[112] The discretion afforded the judge in such circumstances is checked only by the operation of an abuse of discretion standard in

110. United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986) (quoting 2 J. WIGMORE, EVIDENCE § 278 (Chadbourn Rev. 1979)).

111. The authors have been unable to find any reported case dealing with the operation of Rule 804(b)(6) in a civil case. *See supra* note 98. This fact argues for the repeal of the Rule for civil cases as apparently it is not necessary, given the dearth of application in the nearly 10 years of operation of the rule.

112. FED. R. CIV. P. 37(b).

reviewing any court-imposed sanction. Sanctions may include an order instructing jurors that matters about which the discovery abuse occurred are presumed to be true, precluding the offending party from opposing certain evidence, striking a pleading, dismissing an action, or ordering judgment against the offending party.[113] In addition, there remains the opportunity for the judge to hold the offending party in civil contempt.[114]

In order for a party to effectively procure the unavailability of a witness in civil litigation the procurement must occur in the discovery phase of the case. Otherwise, the opposing party will have had the opportunity to take the deposition of the witness in question, and assuming that witness is unavailable for any of the broad reasons set forth in Rule 804(a), the deposition testimony can be admitted pursuant to the well recognized former testimony exception to the hearsay rule codified in Rule 804(b)(1). Deposition testimony that meets the requirements of Rule 804(b)(1), unlike that in Rule 804(b)(6), contains significant indicia of trustworthiness: the fact that the testimony is under oath, and the party against whom the former testimony is offered must have had an opportunity and similar motive to develop the testimony of the witness.

If the party effectively precludes discovery of the testimony of a witness by procuring the unavailability of that witness, then the Rule 37 sanctions are available. In that case the judge can, through the exercise of her discretion, fashion an order that and sanctions the precise offensive conduct of the party involved. Certainly this has to be a better response than that offered by Rule 804(b)(6) allowing unreliable and untrustworthy evidence to provide the basis for a civil verdict.

Let's return to our civil hypothetical and the claimed procurement of the unavailability of Ms. Butler for trial testimony.[115] Should the judge in *Allen v. Acme* decide that the discovery deposition of Ms. Butler was thwarted by the claimed activity of Acme, the judge would have available to her several potential solutions that are superior to the solution provided by Rule 804(b)(6) of allowing in evidence unreliable hearsay. The judge could merely follow Federal Rule of Evidence 703 to get the same result as under Rule 804(b)(6). Pursuant to Rule 703,[116] Caruthers would be allowed to rely on

113. FED. R. CIV. P. 37(b)(2).

114. FED. R. CIV. P. 37(b)(2)(vii).

115. *See supra* pp. 64-66.

116. FED. R. EVID. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.").

any facts normally relied upon by experts in his field, even if they are otherwise inadmissible. The Butler evidence qualifies as such. Rule 703 goes on, however, to provide that otherwise inadmissible foundational evidence cannot be disclosed to the jury unless the judge finds that its probative value substantially outweighs its prejudicial effect. In light of the conduct of Acme, the judge could determine that the probative value of the Butler evidence substantially outweighs the prejudicial effect and allow it to be disclosed to the jury. In this way, the law of evidence would work to achieve the equity sought by Rule 804(b)(6) without requiring at any time that the predicate facts of the rule be shown or allowing untrustworthy evidence to be used to reach a verdict. Alternatively, the judge could preclude the other Acme engineers from testifying as to how the product was designed; preclude the testimony of Acme's expert witnesses; instruct the jury about the unavailability of Butler, and the reasons why, and instruct them that they must infer that the testimony she would have given would have been adverse to Acme; and the judge could even enter judgment for the plaintiff on liability and allow the trial to proceed on damages. What these potential outcomes demonstrate is that the sanction for the activity covered by Rule 804(b)(6) can, at least in civil cases, be effectuated with the surgical precision available to the judge, as opposed to the bludgeoning result effected by the Rule.

In addition, the actions of Acme in procuring the unavailability of Butler could be sanctioned under the criminal law. 18 U.S.C. § 1512(b)(1) makes it a crime punishable by a fine and up to one year imprisonment to "corruptly persuade[] another person" for the purpose of preventing testimony.[117] Again, this is a criminal remedy that is directed precisely at the offensive conduct and punishes it appropriately.

B. Achieving Equity in a More Principled Way

The evil we have identified in the operation of Rule 804(b)(6) is that, unlike every other exception to the hearsay rule, there is no concern for trustworthiness of the hearsay, and the rule thereby allows such unreliable evidence to be heard by a jury and become the basis of either a civil or criminal verdict.[118] We suggest that the rule, as a hearsay exception, is not only illegitimate, but in many cases unnecessary to achieve the equitable result sought by the drafters of the rule. It is not hearsay that is the problem, but *unreliable* hearsay. In that vein, we suggest that there exists in the law of evidence a legitimate hearsay exception that has guarantees of trustworthiness which often applies to the very circumstances sought to be equitably remedied by Rule 804(b)(6).

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117. 18 U.S.C. § 1512(b)(1) (2000).

118. And of course, we suggest that the rule is based on the application of a Confrontation Clause doctrine that unfortunately found its way into hearsay law; a place, we suggest, in which it has no legitimacy. *See supra* Part II.

The drafters of the Federal Rules of Evidence understood that they could not possibly anticipate every circumstance where an out-of-court statement had sufficient reliability, trustworthiness and necessity[119] such that it should be admitted against a hearsay objection. That understanding is currently embodied in Rule 807:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . .[120]

The residual exception of Rule 807, as did its predecessor rules, invites the trial judge to engage in a kind of balancing that implicates both the necessity and trustworthiness of the proposed evidence. That balancing is most likely to result in a fair determination of the admissibility of statements for which no specific exception exists. These are precisely the considerations that are missing from Rule 804(b)(6), and, in fact, are irrelevant to its operation.

Resorting to Rule 807 for the admissibility of statements made by a witness who has intentionally been made unavailable by the wrongdoing of a party is preferable to the operation of Rule 804(b)(6) in several respects. First, the initial inquiry for a judge in making the admissibility decision is whether there exist circumstantial guarantees of trustworthiness in the proffered statement. Unlike Rule 804(b)(6) statements, where reliability and trustworthiness are irrelevant, Rule 807 statements must, by the plain words of the rule, be trustworthy. In making that determination the judge may consider any circumstance presented by the proffered statement and its context that makes the statement one appropriate for fact-finder consideration. Rather than ignoring the primary consideration for the admissibility of any evidence, Rule 807 makes trustworthiness the paramount factor.

Second, by the operation of Rule 807(A), the only time such a statement will be admissible is when it proves a material fact. As a result, the broad relevance standards of Rules 401 and 402[121] (used for Rule 804(b)(6) state-

119. The hallmarks of exceptional hearsay.

120. FED. R. EVID. 807 (providing for notice to the party against whom the statement is offered).

121. FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided

ments) are supplanted by a materiality requirement whereby the judge, in making the admissibility calculation can give greater weight on the side of admissibility to statements the more central they are to the issues involved in the case. Thus, in a case where the statement is one of the victim of the crime and directly about the facts of the crime charged, the judge can find great materiality and weigh that factor in favor of admissibility. If, however, the statement is about a tangential issue in the case, the judge can find less materiality and weigh that factor against admissibility. Of course, the likelihood that a party would procure the unavailability of witness certainly must increase with the importance of the witness and the issues about which the witness will testify.

Third, Rule 807(B) injects into the admissibility decision an element of necessity. Recognizing that hearsay statements not already covered by the enumerated exceptions in Rules 803 and 804 (given the large number and breadth of those exceptions)[122] might be more problematic, Rule 807 requires the judge to consider and decide that the out-of-court statement in question be more probative on the point on which it is offered than other evidence that the party can reasonably offer. This factor requires a balancing by the judge regarding the strength of the evidence and the strength of the proponent's case without it. If there exists other, more probative evidence on the point, the statement is not admissible. When a judge is not able to make a bright line decision on the quality of probationer of the statement versus other evidence on a particular point, she can use the necessity of the evidence as part of the balancing invited by the rule in making the admissibility decision. The greater the probity, the more likely the out-of-court statement will be admissible.

In this balancing, statements of witnesses made unavailable by the intentional wrongdoing of a party will more likely be admitted when they are necessary to a fair determination of the case. By operation of the Rule, however, if a party can otherwise prove its case, statements that might have the infirmities attending some Rule 804(b)(6) statements can be excluded at no cost to the justice system. The greater the necessity, the more likely the evidence will be admitted. Of course, necessity considerations are not balanced in Rule 804(b)(6). If the witness has been made unavailable by a party for trial testimony, the necessity of the hearsay statements of the missing witness is presumed, whether or not those statements have any indicia of trustworthiness.

Fourth, Rule 807(c) gives the judge authority to consider any fact surrounding the proffered hearsay statement that impacts either the purpose of the rules of evidence,[123] generally, or the interests of justice as they are im-

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by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.")

122. *See supra* notes 27-31 and accompanying text.

123. Federal Rule of Evidence 102 lays out the purpose of the Rules: "These rules shall be construed to secure fairness in administration, elimination of unjustifi-

pacted by the admissibility of the statement in question. Federal Rule of Evidence 102 provides:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined.

Utilizing this definition of the purpose of the rules of evidence in the admission calculus regarding the statements of witnesses who have been made unavailable by the wrongdoing of a party, the following factors would necessarily be considered: (1) the nature of the wrongdoing; (2) the importance of the statement to a fair determination of the case; and perhaps most importantly (3) whether the truth seeking function of the courts will be hampered by the exclusion of the statement in question. The interests of justice mandate the same considerations. Rule 807 analysis invites and demands a case-by-case, statement-by-statement consideration of any and all factors that impact the overall fairness of the proceedings to the parties. This sort of inquiry, by a judge trained and experienced in the art and science of making such balances, is preferable to the blanket rule of admissibility of Rule 804(b)(6), which sanctions all wrongdoing that procures witness unavailability in the same way without regard to the seriousness of the wrongdoing or the harm done to fairness of the proceeding by introducing statements (with no requirement of trustworthiness).

Mindful that the Federal Rulemakers had laudable and important purposes in enacting Rule 804(b)(6), we anticipate the argument that the application of Rule 807 will be too narrow to admit significant amounts of "wrongdoing hearsay" to be effective to meet Rule 804(b)(6)'s goals. When the liberal admissibility that most federal appellate courts provide to so-called "near-miss" residual hearsay, is taken into account such concerns prove misplaced.

Rule 807 admits hearsay which is "not specifically covered by Rule 803 or 804." As Judge Weinstein and Professor Berger have found:

> Although there was initially some debate about the meaning of this phrase, the majority of circuits have concluded that the phrase means only that, if a statement is *admissible* under one of the hearsay exceptions, that exception should be relied on instead of the residual exception. If a hearsay statement is similar to those defined by a specific exception but does not actually qualify for admission

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able expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined."

> under that exception, these courts allow the statement to be considered for admission under the residual exception.[124]

The Judge and Professor go on to say that:

> In ruling on the admissibility of any evidence [offered pursuant to Rule 807], the court must assess its relevancy and reliability, as well as the need for the evidence. . . . The need for the evidence must be considered in light of the basic assumption underlying the hearsay rule that statements made directly in the courtroom are more reliable than hearsay. *In other words, the court must balance need against trustworthiness.*[125]
>
> The need assessment varies depending on whether the declarant is available to testify. The fact that a declarant is available usually minimizes the need to admit hearsay. . . . Even though the need to admit hearsay statements is usually high when the declarant is unavailable, the trial court must still determine whether the probative value of the evidence is also high because some guarantees of trustworthiness are present. One factor that the trial court may consider in "determining the admissibility of [*hearsay under the Residual exception*] is the *extent of the defendant's role in making the witness unavailable.*"[126]

One of the typical kinds of evidence admitted under Rule 807 is grand jury testimony of a witness who has been made unavailable. Grand jury testimony has some indicia of reliability (the oath, the formality of the proceeding), but fails the admissibility test of Rule 804(b)(l) which requires the opportunity to cross-examine admissible "Former Testimony." The fact that all federal courts of appeals approve of the admissibility of this "near-miss" testimony indicates the sort of coverage which Rule 807 would provide to what is typically addressed by "Forfeiture by Wrongdoing."

Would the out-of-court statements that are the subject of our two hypotheticals meet Rule 807 standards for admissibility? In *U.S. v. Jones*, our

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124. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 807.03(4) (Joseph M. McLaughlin ed., 1975) (footnotes omitted). The majority Court of Appeals position is represented by: United States v. Laster, 258 F.3d 525, 530 (6th Cir. 2001); United States v. Earles, 113 F.3d 796, 800 (8th Cir. 1997); United States v. Ismoila, 100 F.3d 380, 393 (5th Cir. 1996); United States v. Deeb, 13 F.3d 1532, 1536-37 (11th Cir. 1994); United States v. Clark, 2 F.3d 81, 84 (4th Cir. 1993); United States v. Guinan, 836 F.2d 350, 354 (7th Cir. 1988); United States v. Marchini, 797 F.2d 759, 763 (9th Cir. 1986).

125. WEINSTEIN & BERGER, *supra* note 124, § 807.03(3)(b) (emphasis added).

126. *Id.* (emphasis added).

hypothetical,[127] the statement made by former girlfriend, Ms. Pierce (now unavailable, we will assume, due to the wrongdoing of the defendant), would likely be inadmissible. The statement by Ms. Pierce, the former girlfriend, does contain some indicia of trustworthiness. In her statement about Jones's killing of Gebippe she expresses concern about her own well-being and points her friend in the direction of the defendant if anything untoward happens to her. The government could argue that the statement was reliable because it provided a guidepost to Pierce's friend on how she might be rescued if she turned up missing. That being said, it is problematic to suggest this statement's trustworthiness is equivalent to that required by the enumerated hearsay exceptions, there being a grossly incomplete and faulty analogue to Statements Under Belief of Impending Death.[128] The other balancing factors of Rule 807 weigh heavily, however, in favor of admissibility. The conduct of the defendant is reprehensible; the testimony Pierce could provide was at the heart of the murder charge; her testimony cannot be replicated by other means; and the interests of justice and the purpose of the rule of fair proceeding may very well be advanced by admitting the Pierce statements. In making the Rule 807 balance would a judge decide the requirements are met for admission of Pierce's statement? Likely no, because the statement contains insufficient indicia and therefore, is inappropriate to put before the jury.

The *Allen v. Acme* statements of Butler stand a better chance of admissibility pursuant to Rule 807.[129] At the time of the making of the statement to Caruthers, Butler was arguably admitting that she had engaged in wrongful conduct when she went along with the design flaw in the buzz saw that eventually injured Mr. Allen. Although insufficient in character to meet the Statement Against Interest[130] exception to the hearsay rule because it is unlikely that Butler believed that she was subjecting herself to civil or criminal liability at the time it was made (she was after all complaining about her firing and offering excuses), the statement does have some indicia of trustworthiness. Butler, in the context of making the statements sought to be admitted, revealed an unflattering allegation (sexual harassment) to a friend; she did admit to being morally infirm by knuckling under to her boss in not pursuing her safety objections to the buzz saw design. In addition, her statement did contain technical data, provided to a person who would understand it and a person who was employed by a competitor of her former employer. These trustworthiness factors, taken together with the lengths to which Acme went to procure her unavailability, the fact that other Acme designers appear to be taking a unified position and that her statement about the product are directly about the central issue in the case (not proven alternatively with reasonable ease) all point in favor of admissibility.

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127. *See supra* pp. 62-64.
128. FED. R. EVID. 804(b)(2).
129. *See supra* pp. 64-66.
130. FED. R. EVID. 804(b)(3).

Whatever the outcome of our hypothetical cases, evidence admitted pursuant to Rule 807 has the advantage of considering and valuing the trustworthiness of the statement, the necessity for a fair determination of the case and the interests of justice in determining its admissibility, all of which are not accounted for in Rule 804(b)(6) except to the extent that the punishment of the procurer of witness unavailability has an element of rough justice. The other advantage of using Rule 807 is that it makes the admissibility of statements dependent on reliability, trustworthiness and necessity (traditional evidence admissibility considerations) and takes the law of evidence out of the punishment business.

V. CONCLUSION

In making our case for repeal of Rule 804(b)(6), we evaluated the experience of the states which have enacted or adopted a Forfeiture by Wrongdoing analogue in state evidence practice. As the attached Appendix demonstrates, many states have adopted some form of Forfeiture Hearsay Rule. Those exceptions adopted in Maryland and California represent divergent ways in which states have attempted to admit the forfeiture hearsay while showing at least some concern for the trustworthiness of such evidence.

California provides an excellent model in its section 1350 of the California Code.[131] Because California does not have a Residual Exception, it has incorporated the requirement of "circumstantial guarantees of trustworthiness" into its forfeiture rule, limited its application to unavailability caused by murder and kidnapping and required both corroboration and proof of the predicate by "clear and convincing evidence." California section 1350 evinces a balanced approach to forfeiture by wrongdoing which does not sacrifice the truth-seeking function of the trial. Though we applaud the trustworthiness requirements of section 1350, we understand that a "clear and convincing evidence" predicate proof standard is unknown to the Federal Rules and that requiring corroboration, though adding the trustworthiness of forfeiture hearsay, cuts against Federal Rule 807's necessity requirement.

Maryland attempts another approach more limited than that in the Federal Rules by limiting forfeiture hearsay (without a particularized showing of trustworthiness) to: (1) statements written by the unavailable witness, (2) written statements adopted by the unavailable witness, (3) statements, written or oral, made under oath, and (4) statements simultaneously recorded by electronic means.[132] We are troubled by the absence of reliability of some of the above generic hearsay statements, though as we have noted federal courts routinely admit statements under oath (grand jury testimony) where unavailability has been procured under Rule 807.

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131. CAL. EVID. CODE § 1350 (West 1995).

132. MD. CT. R. 5-804 (b)(5)(A) (applying only in civil cases possibly because of presumed Confrontation Clause issues).

We have chosen a middle ground that requires a genuine showing of reliability on the one hand, without requiring corroboration or "clear and convincing" proof on the other. In our view, our approach abandoning Rule 804(b)(6) and relying: (1) on the criminal law, (2) the missing witness-consciousness of guilt instruction, (3) civil sanctions and (4) Rule 807 provide an appropriate balance for the federal courts, and preserves the truth-seeking function of the trial while deterring and punishing the wrongdoer and minimizing or eliminating his ability to profit from his wrongdoing. This approach accomplishes the rulemakers' goal of reliable verdicts on a level playing field, and does so while maintaining the integrity of our civil and criminal justice systems.

APPENDIX

State	Forfeiture Hearsay Exception	Source	Civil/ Criminal	Rule of Evidence or Case based	Trustworthiness	Quantum of Proof	Nature of Wrong-doing	Notice
Alabama	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Alaska	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Arizona	Yes	Case law	Criminal	924 P.2d 497	Unclear	None Specified		None
Arkansas	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
California	Yes	Statute & Caselaw	Criminal Only in cases of a "Serious Felony"	CAL EVID CODE § 1350, 152 P 3d 433	Yes	Clear and Convincing	Homicide or Kidnap-ping	None
Colorado	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Connecticut	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Delaware	Yes	Statute	Both	DEL. R EVID. 804(B)(6)	No	None Specified		None
Florida	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Georgia	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Hawaii	Yes	Statute	Both	HAW. R. EVID. 804(B)(7),	No	None Specified		None
Idaho	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Illinois	Yes	Caselaw	Criminal	870 N.E 2d 333	No	None Specified		None
Indiana	Yes	Caselaw	Both	866 N.E 2d 855		None Specified		None
Iowa	Yes	Caselaw	Criminal	606 N.W.2d 351	No	None Specified	Very Broad, simple persua-sion not to testify qualifies	None
Kansas	Yes	Caselaw	Criminal	88 P 3d 789, 769 P 2d 25	No	Preponderance of the Evidence		None
Kentucky	Yes	Statute	Both	KY R EVID 804(B)(5)				None
Louisiana	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Maine	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Maryland	Yes	Statute	Both; Criminal Cases Limited to Felonies	MD RULES, R. 5-804(B)(5)	Yes (civil only)	None Specified		None
Massachusetts	Yes	Caselaw	Both	830 N.E.2d 158	Undecided (see FN21)	Preponderance of the Evidence	Very Broad, includes simple persua-sion or collusion	None
Michigan	Yes	Statute	Both	MICH R EVID. 804(B)(6)	No	Preponderance of the Evidence		None
Minnesota	Yes	Caselaw	Both	291 N W 2d 208; 726 N.W 2d 464	Possibly; see 726 N W.2d at 480	Preponderance of the Evidence	~~~	~~~
Mississippi	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~

State	Forfeiture Hearsay Exception	Source	Civil/ Criminal	Rule of Evidence or Case based	Trustworthiness	Quantum of Proof	Nature of Wrong-doing	Notice
Missouri	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Montana	None	~~~	~~~	Specifically not adopted in 127 P.3d 458, 470 n.2	~~~	~~~	~~~	~~~
Nebraska	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Nevada	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
New Hampshire	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
New Jersey	Yes	Caselaw	Criminal	484 A.2d 1330	No	Preponderance of the Evidence	Very Broad, includes "coercion"	~~~
New Mexico	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
New York	Yes	Caselaw	Criminal	85 N.Y 2d 359	No	Clear and Convincing		None
North Carolina	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
North Dakota	Yes	Statute	Both	N.D R. EVID 804(B)(6)	No	None Specified		None
Ohio	Yes	Statute	Both	OHIO R. EVID 804(B)(6)	No	Preponderance of the Evidence		Yes
Oklahoma	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Oregon	Yes	Statute	Both	OR REV STAT § 40.465(3)(f)	No			None
Pennsylvania	Yes	Statute	Both	PA. R. EVID. 804(B)(6)	No	Preponderance of the Evidence		None
Rhode Island	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
South Carolina	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
South Dakota	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Tennessee	Yes	Statute	Both	TENN R EVID. 804(B)(6)	No	None Specified		None
Texas	Yes	Caselaw	Both	195 S W 3d 114	No	Preponderance of the Evidence	~~~	~~~
Utah	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Vermont	Yes	Statute	Both	VT. R EVID 804(B)(6)	No	None Specified		None
Virginia	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Washington	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
West Virginia	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~
Wisconsin	Yes	Caselaw	Both	727 N.W.2d 518	No	Preponderance of the Evidence		None
Wyoming	None	~~~	~~~	~~~	~~~	~~~	~~~	~~~

NOTES ON STATE ADOPTION OF FORFEITURE BY WRONGDOING

Basic Notes

Number of States with FBW: 24

Number of States that have incorporated it into their Rules of Evidence: 13

Other Outliers

CA, NY, 5th District are the only Jurisdictions Clear and Convincing Quantum of Proof

CA only State with a specific FBW for criminal, but not civil trials.

CA only State that limits wrong doing to Homicide and Kidnapping.

Ohio is the only State that has a notice requirement.

Maryland is the only State that has different requirements for FBW in Civil and Criminal cases.